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Chairperson: Mr. Rivas Posada

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The meeting was called to order at 10.05 a.m.

General comments of the Committee (*continued*)

Draft general comment No. 32 on article 14 of the Covenant (CCPR/C/GC/32/CRP.1/Rev.4) (*continued*)

Paragraph 23 (*continued*)

1. **Ms. Motoc** drew the Committee's attention to a text on military tribunals adopted by the International Commission of Jurists (ICJ) in 2006. Although it was not the Committee's practice to reproduce other bodies' texts, it was important to specify that military tribunals should not be able to try genocide, war crimes or crimes against humanity, as past experience had revealed that they did not always provide a fair trial. She wondered whether the other members would agree to insert such a reference in paragraph 23.

2. **Ms. Chanet** said that she preferred to keep the text as drafted by Mr. Kälin, i.e. with the word "normally", rather than take up Sir Nigel Rodley's suggestion from the Committee's previous discussion, which did not lay down specific conditions for the exceptional establishment of military tribunals for trying civilians; that was of some concern, especially in light of the Committee's general comment No. 29 on article 4.

3. **Ms. Wedgwood** observed that military tribunals were traditionally the place to try war crimes, as could be seen, for example, from article 84 of the Third Geneva Convention relative to the Treatment of Prisoners of War. She did not fully agree with the suggestion that the Nürnberg trials had been an example to the contrary, as suggested by Ms. Chanet during the previous day's discussion, because while the Nürnberg courts had been an international undertaking, they had nonetheless sat as military tribunals. Furthermore, the Nürnberg proceedings had not been held strictly for war personnel. The formulation in paragraph 23 was a little too exclusive because not only military personnel had been tried in military tribunals.

4. **Ms. Motoc** said that the state of necessity had to be further specified as it had more than one accepted definition in international law. The text should take into account general comment No. 29, paragraph 16, which stressed that even in a situation of armed conflict, the right to a fair trial was guaranteed under article 4 of the Covenant.

5. **Mr. Shearer** said he agreed that general comment No. 29 needed to be reflected in the current draft text, perhaps by way of a footnote on states of necessity. War crimes tribunals tended to be sui generis and did not necessarily come under article 14, but adding the phrase "or committed in an exclusively military context" to the end of the sentence beginning "The trial of military personnel" would cover that eventuality. Such a change would preserve the jurisdiction of courts martial in some countries in respect of offences that were not of an exclusively military nature.

6. **Mr. Amor** said that paragraph 23 could be made more specific without referring to states of necessity and suggested inserting, after the third sentence in the French text, the words "*Un civil ne devrait pas être jugé par un tribunal militaire à moins que l'administration de la justice par ce dernier procède d'une manière équitable, impartiale et indépendante, compte dûment tenu de l'observation générale n°29, lorsqu'il y a des circonstances exceptionnelles*". That text would cover a number of situations while avoiding a total break with the Committee's jurisprudence.

7. **Ms. Wedgwood**, responding to Ms. Motoc's point, said that a criticism of some codes of military justice, including that of her own country, was that they did not include references to genocide and crimes against humanity; instead, such crimes were tried as civilian crimes. The problem with stating that a military tribunal could try what were, in practice, war crimes, but could not try crimes against humanity or genocide, was that the definitions were always extremely technical. In fact, the advantage of crimes against humanity, from a strictly prosecutorial point of view, was that the nature or the state of armed conflict need not be debated: systematic abuses against civilians, even if they constituted a one-time event, could be considered crimes against humanity. The practice of the International Criminal Tribunal for the Former Yugoslavia was to group together the charges of war crimes, crimes against humanity and genocide, since separating one from the other was so difficult. It would be artificial to try to make such a distinction when the international tribunals themselves had felt it necessary to exercise discretion in how to charge a particular offence. International humanitarian law and the law of armed conflict had in a sense merged and

crimes against humanity were now part of the law of armed conflict.

8. **Ms. Chanet** said that if genocide or crimes against humanity had not been committed by military personnel, there was no reason to try them in a military tribunal. However, where war crimes were in question, crimes against humanity and genocide could be considered related crimes and therefore could be tried in military tribunals. She reiterated that the Nürnberg institutions, which were military tribunals set up to resolve an armed conflict within the framework of an international agreement, did not come under the Committee's draft general comment on article 14. Rather, the current draft aimed at improving on the previous general comment on article 14 (No. 13), which tolerated the establishment of military tribunals for any reason, with the proviso that they should observe the impartiality and independence stipulated by that article. In the context of a country neither at war nor in a situation of emergency, there was really no reason for the military to try non-military offences except where the State wished to impose its influence and considered military tribunals a way to find judges who would take decisions in its interest.

9. **Sir Nigel Rodley** said that trying civilians in military tribunals and trying military personnel for certain non-military offences were two issues that had to be kept separate. Military justice for military personnel did not fall under article 14, but rather was an issue of impunity; he therefore supported Mr. Shearer's suggestion of a footnote. The Committee should focus on the first issue, which required strong language, since it had more to do with ensuring justice than simply the right to a fair trial. Referring to imperative considerations of necessity, he said he would not be against modifying the formulation he had proposed previously. His point, however, was that only very exceptional circumstances allowed for special courts or military courts to have jurisdiction over civilians or for jurisdiction to be taken out of the hands of the ordinary courts because they could not deliver justice. Unless the Committee considered that military tribunals should not have jurisdiction over any civilian matter, in which case a simple reference to general comment No. 29 would suffice, the text should be amended to make it clear that there should be a heavy burden of proof on States parties to justify a departure from the course of ordinary civilian justice.

10. **Mr. Amor** said that he was concerned about the jurisdiction of certain special courts, such as the *Cour de sureté*, which tried offences involving national security. While there were legitimate concerns about that sort of case being tried by military tribunals, civilian tribunals could easily become embroiled in politics in such circumstances, and in the end suffer just as much from lack of credibility as military tribunals. The *Cours de sureté* were characterized by political influence and had a history of injustice and unfairness. Therefore, military tribunals should deal with military personnel, but in special cases, or in a case involving both military personnel and civilians as co-defendants, military tribunals should be allowed to conduct the hearing, with the proviso that they should observe the conditions set out in article 14 and, in exceptional circumstances, those laid down in the Committee's general comment No. 29 on article 4.

11. **Mr. O'Flaherty** said that while he understood the reasons for the language used to deal with the issue that military personnel should be tried only in military courts and in respect of military offences, and the desire to avoid impunity, the resulting sentence had given rise to legitimate concerns, as expressed by Ms. Chanet and Mr. Shearer. Given the prevalence of military law practice around the world, the sentence as it stood was misleading and inappropriate. Rather than being covered by a footnote, impunity should be addressed by an additional phrase to the effect that military courts in dealing with military personnel should concern themselves primarily with military offences, and at no time could any invocation of military law result in a consequence of impunity.

12. He disagreed with the view that establishing a military court and then making it compliant with article 14 was sufficient to legitimize it for the trying of civilians. The onus should be on the State to demonstrate the exceptional nature of the circumstances, which should be specifically relevant to the category of case at issue.

13. **Sir Nigel Rodley** said that there were cases where military justice was actually to be preferred to the jurisdiction of special civilian courts. The advantage of the latter, however, was that, because of their openness, it could be ascertained whether they were impartial and independent, whereas military courts were camouflaged. It was also easier to identify the political dimensions of non-military jurisdiction. He proposed that two or more stages of exceptionality

should be implicitly recognized. In the first stage, the procedures of ordinary criminal courts would be modified, so as to allow, for instance, evidence obtained through wiretapping. In the second stage, protection would be provided for special courts where there was a risk of intimidation of jurors. The wording of the paragraph should allow for such a gradation in departing from ordinary justice, with military justice representing the extreme limit of such a departure.

14. **Ms. Chanet** stressed that the State should justify a decision not to have recourse to a civilian court and that such a decision would not be acceptable when taken in order to circumvent the requirements of article 14; it would need to be appraised case by case. The onus of proof lay with the State.

15. **Ms. Wedgwood** noted a new tendency, which was taken into account by the wording of paragraph 23, to outsource military tasks to civilian contractors. In practice, however, no good way had been found of ensuring the necessary fairness and independence of military courts in trial proceedings against such persons, who often operated far from their country of origin. New ways needed to be found of trying such persons, adapted to the practical difficulties of the situation. She also cautioned against the danger of military courts wrongly criminalizing certain acts, for instance by labelling free speech as seditious libel.

16. **Ms. Palm** concurred with the comments regarding the exceptional nature of the trial of civilians by military courts. Stronger wording was required, so that States would not only have a burden of proof but would also have to invoke imperative reasons. She also pointed to the possibility of semi-military courts and wondered whether that might be covered by paragraph 23.

17. **Mr. O'Flaherty** emphasized that impunity was not an article 14 issue. He agreed with Sir Nigel Rodley's suggestion as to a gradation of exceptionality but feared that it would make for complexity in the drafting. Paragraph 24 included elements relevant to such a gradation process.

18. **Ms. Motoc** said that even where there was a state of necessity, principles had to be established that were also applicable to military courts.

19. **Mr. Kälin**, speaking as rapporteur for the draft general comment on article 14, said that while there was a consensus on parts of paragraph 23, there remained some points that required clarification before any alternative wording could be proposed. On the issue, in particular, of the trial of military personnel by non-military courts, he doubted that the addition of a footnote, in order to refer to a matter that he recognized to come outside the scope of article 14, would make for greater clarity. One solution might be to delete the last sentence of the paragraph.

20. A further question to be resolved was whether military courts should be able to deal with cases of crimes against humanity and genocide. He agreed that they were particularly well placed to try war crimes since they were better able to determine military necessity; however, it was not always easy to draw a line between such crimes and crimes against humanity. It might therefore be better not to make any reference to different categories of international crime.

21. He noted the existence of general agreement on the trial by military courts of civilians performing military tasks, as in the case of the Nürnberg military tribunals, where such persons had been considered part of the war machine. The Committee might wish to insert in paragraph 23, after the words "not performing military tasks", a phrase along the lines of "or otherwise intimately linked to the armed forces".

22. It also seemed to be agreed that the use of the word "normally" in that paragraph meant that there were exceptions: it remained to be determined what they were. Everyone recognized that in situations where article 4 could be invoked (derogation in time of public emergency), there could be an exception to the rule of civilians not being tried by a military court. Then there were what Sir Nigel Rodley had referred to as imperative considerations of necessity, which left open the question of when such cases would not be covered by article 4 and whether they necessitated the creation of a new category of semi-derogations. The third possible exception was the trial of civilians by military courts that would give every guarantee of impartiality and independence. However, that amounted to a requirement rather than an exception.

23. **The Chairperson** invited the members of the Committee to comment on the three possible exceptions to the limitations to the jurisdiction of military courts over civilians.

24. **Ms. Chanet** said that she agreed with the article 4 exception. On the second question, expansion of the text along the lines proposed was fraught with dangers.

As for the suggestion that the third case of exception would create a new category of derogation, article 4 already allowed for such derogations: where military courts were deemed admissible, under circumstances specified by the State, they were still required to comply with article 14.

25. **Sir Nigel Rodley** expressed concern that in the wording remaining after the suggested deletion the impunity dimension would not be taken into account. He suggested the addition of a phrase along the lines of "bearing in mind risks to impunity". He said that rather than seeking to create what Mr. Kälin had identified as a new category of semi-derogations, he would prefer a reference to article 4. If no mention was made of derogation, then necessity must be invoked as a way of ensuring a buffer between ordinary and extraordinary justice. He trusted that the paragraph would still explicitly rule out the jurisdiction of military courts over civilians.

26. **Ms. Wedgwood** said that the addition to the third sentence proposed by Mr. Kälin was too vague and suggested instead "or who have committed crimes arising in an armed conflict". In cases of armed conflict abroad, article 4 would apply; in cases of military occupation, the need for security did not overrule the requirements of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War.

27. **Mr. Amor** said that the Committee should not try to be too ambitious by trying to take into account all possible situations. Even in a purely military context, the fundamental principles of justice and article 14 should apply. The situation of civilians performing military tasks, or paramilitary groups, or armed militias in an internal conflict, was a grey zone and should be left out. Trial of a civilian before a military court might be acceptable in exceptional circumstances, but articles 4 and 14 and the Committee's general comment No. 29 would still apply.

28. **Ms. Motoc** said she was in favour of a strict interpretation of article 14 and agreed that it should be explicitly stated that military courts must be impartial and independent and observe the same principles of justice as civilian courts. She also believed there should be some reference to the need to avoid impunity. A reference could also be added at the end of the paragraph to underscore the need for military judges to be independent of the military hierarchy, which would provide a link with the following paragraph on "faceless judges". With regard to the trial of civilians by a military court, she suggested the Committee might wish to study the work of the ICJ on that subject.

29. **Mr. Shearer** said he took note of the comment by Ms. Wedgwood concerning the administration of justice in occupied territories pursuant to the Fourth Geneva Convention, but felt such situations fell under the heading of *lex specialis*, specifically the law of armed conflict; perhaps a footnote could be added to say the paragraph did not apply to situations of armed conflict. In any case, he suggested that further discussion of paragraph 23 should be deferred pending submission of a new draft by the rapporteur.

30. **Ms. Palm** said that the basic question was whether or not to allow military courts to try civilians solely in the context of a derogation pursuant to article 4, or whether some other exceptional circumstances could also exist. In principle she would prefer only the article 4 derogation but could conceive of the need to envisage other possibilities. In any case, she agreed with Mr. Shearer that the Committee should defer further consideration of the paragraph pending submission of a new text by the rapporteur.

31. **Mr. Iwasawa** said that he was in favour of deleting the fourth sentence of the draft referring to ordinary crimes committed by military personnel. With regard to civilians performing military tasks, he preferred the formulation proposed by Ms. Wedgwood.

32. **Mr. O'Flaherty**, in response to Ms. Palm, expressed concern that limiting the right of military courts to try civilians to a derogation pursuant to article 4 might in fact encourage States to declare a state of emergency.

33. **Mr. Johnson** said that both military personnel having committed a common law offence and civilians having committed an offence of a military nature should be tried before a civilian court. He recalled that the Committee had dealt with that very issue recently when considering the fifth periodic report of Chile and had underscored the need to avoid exceptions to that principle.

34. **Ms. Motoc** noted that the Committee had not yet discussed the issue of courts based on customary law.

35. **Mr. Kälin** said he would like the Committee to discuss the issue of customary courts before trying to

draft a proposal on the subject. He suggested that a new paragraph dealing with customary courts should be inserted between paragraphs 23 and 24, or perhaps elsewhere in the draft comment.

36. **Mr. O'Flaherty** suggested that the Committee should first go on to discuss paragraph 24 and then return to the issue of customary courts later, with a new paragraph to be inserted elsewhere in the text.

37. **The Chairperson** said he took it that the Committee wished to defer further discussion of paragraph 23.

Paragraph 24

38. **Mr. Amor** said that there were situations, which had been recognized by the Committee in its jurisprudence, where the use of "faceless judges" could be justified by the need to avoid intimidation and threats which could affect judicial decisions. The central problem was whether or not there was some mechanism to provide guarantees of the independence and impartiality of the judges in question. Accordingly, he suggested the insertion, at the end of the first sentence of the French text, of the words "*dont l'identité et le statut ne sont pas vérifiés par une autorité indépendante*". That would imply that the use of "faceless judges" could be acceptable in extraordinary circumstances.

39. **Mr. Shearer** said Mr. Amor's suggestion was a very practical one. He also suggested that, in the second sentence, the word "often" should be inserted before the verb "suffer". Those two changes would reinforce the idea that the use of "faceless judges" was acceptable only in extreme circumstances and provided that all other guarantees of a fair trial were maintained, the independent authority entrusted with the task of vetting the judges could be an Ombudsman for example.

40. **Mr. O'Flaherty** agreed with the proposed amendments but said that the paragraph should stress that the use of "faceless judges" was acceptable only in truly extraordinary circumstances and that the State party must justify the use of such a measure. It should also be clear that any of the irregularities mentioned in the paragraph, whether or not in the context of a court with "faceless judges" would in and of themselves constitute a violation of the Covenant.

41. **Ms. Wedgwood** agreed with the amendment suggested by Mr. Amor. She also pointed out that in some cases jurors too could be subjected to pressure or intimidation and might be anonymous, for example identified only by numbers, and she therefore wondered whether the text should also refer to jurors.

42. **Sir Nigel Rodley** said the position of the Committee had always been to consider recourse to "faceless judges" as acceptable only in truly exceptional cases; in the past when it had found that there had been a violation of the Covenant, there had been other circumstances besides the use of "faceless judges" per se. That was what was implied by the words "in circumstances such as these" in the last sentence. With regard to the suggestion made by Mr. Amor, while he was in favour of making the text as clear as possible, the issue of the independence of the judges involved not only their status, but factors such as whether they were offered incentives and who chose them, for example the executive or the judiciary, and that could not be solved solely by reference to an independent authority confirming their status. He believed the Committee should avoid the impression of, as it were, giving advice on how to make the use of "faceless judges" acceptable. He agreed with the addition suggested by Mr. Shearer, but otherwise believed the text should stand as drafted, implying that the use of "faceless judges" might be possible but referring to the Committee's past experience where the use of "faceless judges" had been associated with unacceptable practices.

43. **The Chairperson**, speaking as a member of the Committee, said that the issue of the anonymity of the judges must be differentiated from the irregularities listed in the second sentence of the paragraph. The Committee's jurisprudence made it apparent that it was the existence of other irregularities in proceedings presided by "faceless judges", not just the fact that the judges were anonymous, that had led to a finding of a violation of the Covenant. The second sentence should be redrafted to make that distinction clearer. The Committee's jurisprudence was based on cases involving the use of "faceless judges" in both Peru and Colombia; he pointed out that such courts no longer existed in those countries, having subsequently been found to be unconstitutional by the respective Supreme Courts, based largely on the Committee's finding of a lack of fundamental guarantees for a fair trial pursuant to article 14.

44. **Ms. Chanet** said that the Committee's jurisprudence was somewhat ambiguous, since it did not condemn special tribunals of "faceless judges" as such, but rather drew attention to the other procedural irregularities that tended to undermine their legitimacy. To be as clear as possible about the circumstances in which "faceless judges" might be acceptable, she felt that the reference to satisfying the basic standards of fair trial, contained in the last sentence of paragraph 24, would suffice.

45. **Mr. Kälin** agreed that the procedural irregularities listed in the second sentence of paragraph 24 were not necessarily attributable to the fact that the tribunals in question were composed of "faceless judges". He therefore proposed inserting the word "often" between the words "but also" and "from".

46. He was hesitant to embark upon a discussion of the specific circumstances in which "faceless judges" might be acceptable because he felt that paragraph 24, in its current form, remained within the scope of the Committee's jurisprudence and left room for future developments. For the same reason, he was also against referring to exceptional cases.

47. Regarding the proposal put forward by Mr. O'Flaherty, he said that the remainder of the draft general comment made it abundantly clear that all the procedural irregularities listed in paragraph 24 were, in and of themselves, violations of article 14 of the Covenant, even in cases where the judges were not "faceless". With respect to Ms. Wedgwood's remarks, he was not opposed to including a reference to jurors, given that they might also need protection from threats and intimidation.

48. **Ms. Wedgwood** said that she would be happy to propose language on jurors. Referring to the term "irregularities" in the second sentence, she pointed out that, in certain circumstances, "irregular" could be taken to mean "unlawful". Accordingly, in order to avoid creating the impression that special tribunals of "faceless judges" were always unlawful, she suggested deleting the word "other".

49. **Ms. Chanet** said that she was opposed to including a reference to jurors, particularly since the Committee had not dealt with any cases of "faceless" juries. Jury service was voluntary in some countries, and therefore individuals with specific grievances could volunteer to serve and then take advantage of their anonymity to pursue their own agendas. If no personal information on jurors was provided, it would be impossible to ascertain whether they were impartial and therefore fit to serve.

50. **Ms. Wedgwood** said that there might have been a misunderstanding regarding the use of the term "faceless". Jurors were never totally anonymous — they were subject to selection interviews and were present and visible during the proceedings — but it was possible to protect them by keeping their personal details (name and address) secret. In response to Ms. Chanet's remarks, she said that she was not aware of any legal system in which potential jurors could volunteer. She also pointed out that in common-law systems the jury was responsible for ruling on matters of fact.

51. **The Chairperson** pointed out that the Spanish phrase "*jueces sin rostro*" was not an official term; the formal name was "*jueces especiales*" or "*jueces excepcionales*".

52. **Mr. Amor** recalled that two separate issues had been raised in connection with paragraph 24: first, how to determine the identity and status of "faceless judges" and, secondly, how to eliminate the procedural irregularities that tended to hamper the pursuit of justice, even when the judges involved were fully identifiable.

53. **Sir Nigel Rodley** remarked that drawing up a list of criteria intended to guarantee the independence and impartiality of "faceless judges" would be a lengthy and difficult task and might even be counterproductive, since States might use that list as the basis for selecting such judges. While paragraph 24 and the Committee's jurisprudence implicitly allowed for the use of special tribunals of "faceless judges", attempts to codify the circumstances in which such arrangements were permissible would be ill-advised.

54. He took issue with Ms. Wedgwood's proposal to delete the word "other" because, for him, the term "irregularities" meant abnormal activities, not unlawful ones. Furthermore, he was strongly opposed to introducing a reference to anonymous juries, particularly since, at least in the United Kingdom, jurors were selected at random and maintained a quasi-anonymous status. It was not necessary to legislate for a situation which, to his knowledge, had never arisen.

55. **Ms. Wedgwood** pointed out that all the procedural irregularities listed in the second sentence

were, in principle as well as in practice, never justifiable. In that context, the term "irregular" could certainly be taken to mean unlawful; deleting the word "other" would disassociate the procedural irregularities from the use of "faceless judges", thereby allowing for situations in which the use of such judges might be permissible. The draft general comment should set out principles, rather than facts, and should not therefore merely summarize the Committee's jurisprudence.

56. **The Chairperson** pointed out that the Committee's jurisprudence relating to "faceless judges" dealt with cases from only two countries, neither of which used a jury system. Accordingly, it might not be appropriate to mention jurors in paragraph 24.

57. **Mr. Iwasawa** said he was in favour of Ms. Wedgwood's proposal to delete the word "other" and of excluding any reference to jurors.

58. **Mr. Bhagwati** wondered whether the list of irregularities in the second sentence should be retained, particularly since most of them could not be justified under any circumstances.

59. **Mr. Kälin** proposed, by way of a compromise, deleting both the word "other" and the comma directly following the word "irregularities" from the second sentence, to leave the phrase "but also from irregularities such as ...". He took the view that the list of irregularities in the second half of that sentence should be retained because it sent a strong message about the unacceptable nature of such procedures. Lastly, he proposed incorporating Mr. Amor's suggestion into the last sentence of the paragraph, which would read: "Tribunals of 'faceless judges', in circumstances such as these and if the identity and status of such judges have not been ascertained by independent authorities, do not satisfy basic standards ...".

60. *Paragraph 24, as amended, was adopted.*

61. **The Chairperson** said that the Committee would discuss the issue of customary courts at a later date.

62. **Mr. Glélé Ahanhanzo**, supported by **Ms. Chanet** and **Mr. Amor**, pointed out that the draft general comment failed to address the essential question of who was responsible for safeguarding the independence of the judiciary.

63. **Mr. Kälin** said that a reference to safeguarding the independence of the judiciary could be incorporated into paragraph 17 of the draft. He would consult with Mr. Glélé Ahanhanzo on appropriate wording.

The meeting rose at 12.55 p.m.